No. 80-898

In the Supreme Court of the United States

OCTOBER TERM, 1980

LINDA M. LIBERI TONER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether petitioner, who initiated this lawsuit by filing a petition in the Tax Court, is eligible for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, Section 2, 90 Stat. 2641 (42 U.S.C. 1988), which permits a fee award "in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code." The court of appeals held that petitioner was not entitled to an award of such fees.

The pertinent facts may be summarized as follows: In January 1971, petitioner was hired to teach the fifth grade at St. Clement Catholic School. At the time she was hired, petitioner was a high school graduate who had completed two years of college at Villanova University. Because she

had not yet received a bachelor's degree, the school required petitioner to earn six hours of college credit per year until she received her degree. During 1973, the taxable year at issue, petitioner took 15 hours of college credit, and deducted her tuition expenses as ordinary and necessary business expenses on her income tax return. On audit, the Commissioner of Internal Revenue disallowed those deductions. Petitioner thereafter filed a petition in the United States Tax Court for a redetermination of the resulting income tax deficiency. In a reviewed decision with seven judges dissenting, the Tax Court upheld the Commissioner's determination that petitioner's college expenses leading to a bachelor's degree and state certification as a teacher were not properly deductible as ordinary and necessary business expenses (71 T.C. 772). The court of appeals reversed. It ruled that the college tuition expenses in question were deductible by petitioner because they were not incurred either to meet the minimum educational requirements of her employment or to qualify her for a new trade or business within the meaning of the pertinent Treasury Regulations (623 F. 2d 315; Pet. App. 2a). The government did not seek further review of that decision.

Petitioner thereafter filed a motion in the court of appeals for an award of attorney's fees, relying upon certain provisions set forth in the Civil Rights Attorney's Fees Awards Act of 1976, *supra*. In a separate opinion (Pet. App. 1a-8a), the court of appeals denied petitioner's motion on the ground that the instant case "was not a judicial proceeding initiated by the United States" (Pet. App. 8a), as required by the statute.

1. The court of appeals correctly held that petitioner was not entitled to attorney's fees. Contrary to petitioner's claims, the Civil Rights Attorney's Fees Awards Act of 1976 does not permit an award of attorney's fees to a taxpayer where, as here, the government did not initiate the litigation. This conclusion has been reached by the Tax Court,

the Court of Claims and every appellate court which has considered the question. See, *e.g.*, *Kipperman* v. *Commissioner*, 622 F. 2d 431 (9th Cir. 1980); *Key Buick Co.* v. *Commissioner*, 613 F. 2d 1306 (5th Cir. 1980), aff'g 68 T.C. 178 (1977); *Aparacor, Inc.* v. *United States*, 571 F. 2d 552, 554-555 (Ct. Cl. 1978) (en banc). These decisions rest upon the first requirement of Section 2 of the Act, *i.e.*, that a fee award be made only in a "civil action or proceeding, by or on behalf of the United States" (Pet. 1). In each instance, the courts have rejected petitioner's contention that the term "proceeding" refers to pre-judicial administrative matters. See the representative remarks made on the floor of the Senate and House, quoted by the court below (Pet. App. 3a-4a).[1] Thus, attorney's fees cannot be recovered for costs incurred by a taxpayer who initiates the litigation by filing a petition in the United States Tax Court.

2. While the term "proceeding" has been held, in other contexts, to refer to certain administrative activities (see, *e.g.*, *New York Gaslight Club, Inc.* v. *Carey*, No.79-192 (June 9, 1980), it does not follow that the term has only one meaning. Indeed, the decisions in the cases cited by petitioner have been grounded on an analysis of the purposes behind the use of the word "proceeding" in the particular statute involved. It is therefore clear that the term "proceeding" has no fixed or immutable meaning and that it does not always refer to, or include, administrative matters. As the

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[1]Petitioner places substantial reliance (Pet. 13-14) upon remarks made by Senator Allen several months after the Act was signed into law, in which he stated that "the formalistic characterization of the taxpayer as plaintiff or defendant" was not relevant in determining whether a fee award could be made. 123 Cong. Rec. 1281-1282 (1977). But the courts have uniformly held that these post-enactment comments were not indicative of Congress' intent when it passed the amendment (Pet. App. 5a). *Patzkowski* v. *United States*, 576 F. 2d 134, 136 n.2 (8th Cir. 1978); *Aparacor, Inc.* v. *United States, supra*, 571 F. 2d at 556-557; *Key Buick Co.* v. *Commissioner, supra*, 68 T.C. at 183.

court below stated (Pet. App. 6a), *New York Gaslight Club* concerned "a statute with a different legislative purpose and history." It is therefore plain that Congress did not intend to cover virtually every tax dispute by the statute here at issue.[2]

3. Moreover, even if petitioner were correct in her legal analysis, the result reached by the court below is nevertheless correct since petitioner failed to meet another well-established prerequisite for a fee award—*i.e.*, that the government's actions in litigating the matter must have been frivolous, unreasonable, or taken in bad faith. See, *e.g.*, *Jones* v. *United States*, 613 F. 2d 1311, 1313 (5th Cir. 1980); *Klotz* v. *United States*, 602 F. 2d 920, 924 (9th Cir. 1979); *Patzkowski* v. *United States*, 576 F. 2d 134, 139 (8th Cir. 1978). See generally *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). As Senator Kennedy stated during the floor debates on the 1976 Act (122 Cong. Rec. 33312 (1976)): "In general, the taxpayer would have to show bad faith on the part of the Government in bringing suit against him in order for fees to be allowed." Senator Kennedy added that "[e]nactment of this amendment should in no way be understood as implying that Congress intends to discourage the Government from initiating legitimate lawsuits under the tax laws" (*id.* at 33313).

Here, the government's opposition to petitioner's claim for a business deduction for the expenses she incurred in earning a bachelor's degree was plainly not frivolous,

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[2]As the court of appeals observed (Pet. App. 6a), limiting the term "proceeding" to judicial activity does not read that word out of the statute. There are, of course, types of court proceedings which are generally not regarded as "actions." On the other hand, petitioner's reading of "proceeding" as encompassing all administrative acts by the Commissioner would read the term "civil action" out of the statute because every tax dispute commences with the Commissioner's disagreement with a taxpayer's position and every court case would then be deemed to have been a "proceeding."

unreasonable or taken in bad faith. A majority of the judges of the Tax Court held that petitioner was not entitled to the claimed deduction, and the Commissioner's reasoning for disallowing the deduction formed the basis of the Tax Court's plurality opinion. Indeed, although the court of appeals reversed the Tax Court, it nevertheless noted that permitting petitioner a deduction in these circumstances was "somewhat of an anomaly" (623 F. 2d at 320).[3]

4. The enactment on October 21, 1980, of the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, upon which petitioner relies (Pet. 17-21), does not require a contrary result. The fact that the 1980 provision allows attorney's fees in certain prescribed circumstances[4] without regard to which party commenced the litigation does not show that Congress intended the 1976 legislation to be similarly broad. Indeed, it is clear from the floor debates preceding the enactment of the 1976 statute that Congress sought to limit fee awards to cases where the government was the plaintiff. Alteration of that rule required specific legislative action, which did not occur until 1980. And implementation of the new rules was deferred until October 1981. Thus, the new Act is not a clarification of the 1976

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[3]Contrary to petitioner's assertions (Pet. 22), she was not acting as a "private attorney general" to insure "the legitimacy and fairness of the law," but, rather, was seeking a special benefit peculiar to her highly unusual employment situation. All other taxpayers not similarly employed as full-time teachers prior to receiving a bachelor's degree will continue to be unable to deduct the expenses of earning such a degree. Thus, the court of appeals' holding below was not based on considerations of fairness, but on a technical interpretation of the Regulations.

[4]Under the new Act, parties (with certain net worth limitations) who prevail in administrative adjudications or civil actions brought by or against the United States will be entitled to attorney's fees unless the position of the United States or the agency involved was "substantially justified or * * * special circumstances make an award unjust." 5 U.S.C. 504(a)(1); 28 U.S.C. 2412(d)(1)(A) (94 Stat. 2325, 2328).

Act, but a "significant change in the existing law regarding attorney fees." S. Rep. No. 96-253, 96th Cong., 1st Sess. 4 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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